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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-396

BUDDY HERMAN MATHIS,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR REHEARING

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The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari entered on January 13, 1975, and (2) granting the Petition for Rehearing.

Petitioner would show two grounds for this motion and proceeds under the rule allowing Petitioner to urge rehearing on substantial grounds available to this Petitioner heretofore although not previously presented or argued as follows, to wit:

(1) The guideline mandate wherein this Court has held that the bench has a responsibility to guard against prejudicial pretrial publicity as enunciated in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), is not practical nor is it effective because of a direct conflict with the First Amendment.

(2) The granting of a long continuance (the hiatus period for "cooling off") is not effective nor practical because in effect this type procedure is in direct conflict with the accused's rights under the Sixth Amendment to a speedy trial.

The consolidated records in these two cases collectively present to this Court without fear of contradiction a well documented history of the struggle of an accused in a rural area to obtain some type of relief which would allow him to be tried in a forum free of prejudice. Each record contains over 800 newspaper articles and support for the accused is enhanced by thorough documentation of additional radio and television media publications addressed to Mobile County together with oral testimony supporting this accused's position.

The Court has seen fit not to grant certiorari. We pray that this Court in its wisdom reverse its ruling and take notice of these two grounds above which have not been urged heretofore. The Attorney General of the State of Alabama himself recognizes that long continuances do not abate voluminous prejudicial pre-trial publicity and each reporting revives with crescendo previously existing prejudice and this approach to the problem violates due process to the accused. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The cases since *Sheppard v. Maxwell*, supra, reveal that many attempts by the courts to guard or prohibit publicity media releases are simply not upheld or sanctioned by appellate tribunals. Guideline orders and/or "gag orders" are simply not popular with appellate tribunals who feel that such mandates are in conflict with the First Amendment. The problems presented here desperately need examining by this Court. *Sheppard v. Maxwell*, supra, has little meaning to an accused if appellate tribunals will not approve lower courts' use of such orders over the press. Although *Sheppard* mandates the use of a guideline order under a similar set of facts as presented in *Sheppard*, the lower court in the case at bar, with utter dis-

regard of the pleading of the accused seeking a guideline order, failed to even rule on the timely motion placed before the court by Petitioner.

Most of the authorities previously cited, subsequent to *Sheppard*, hold that *Sheppard* is the classic case in our jurisprudence which requires that under certain circumstances the bench has the responsibility to protect the accused and issue the guideline order. We here are faced with the problem that lower courts do not adhere to *Sheppard* on this point and when attempts are made by the courts to prohibit the reporting of testimony or the publishing of names of witnesses or the reporting of verbatim testimony, these orders are thereafter struck down. See *State v. Sperry*, 483 P.2d 608 (Wash. 1971); *Johnson v. Simpson*, 433 SW2d 644 (Ky. 1968); *New York Times v. U. S.*, 403 U.S. 713, 29 L.Ed.2d 822, 91 S.Ct. 2140 at page 714 (1971).

In *New York Times*, the dicta was to the effect that courts which allow such orders reflect that they are attempting to increase their powers unnecessarily and thus would lose respect which makes their court orders effective. The *Sheppard* decision ruled that prejudicial pre-trial publicity had saturated the community and thus a fair trial had been denied. We read this decision and we are constrained to believe that the lower court judge was remiss in not issuing a protective guideline order.

Justice Clark, who is now retired from this Court, has indicated that the use of guideline or gag orders was never intended nor enforced by this Court when the *Sheppard* decision was written. See *Christian Science Monitor*, February 26, 1973, page 3, wherein Justice Clark predicted that this Court would soon issue guidelines on gag orders which would seriously restrict their use. In numerous cases where the judiciary has issued gag orders against the publications, the judicial actions on the part of the bench have been reversed by the higher courts. *Sun Company of San Bernadino California v. Superior Court*,

29 C.A. 3d 815 (1973), hrg. denied by the California Supreme Court on March 23, 1973; *U.S. v. Dickinson*, 465 F.2d 496 (Fifth Circuit, 1972) (reversed on the ground the order was constitutionally infirm, but remanded for determination by the District Court if punishment for the wilful disregard of the court order might still be justified); *Wood v. Goodson*, 485 S.W.2d 213 (Ark., 1972).

The Petitioner herein urges that this Court utilize the records consolidated below as the instrument to define and clarify what constitutional rights the accused has and the route that both he and the bench must travel in obtaining a trial free from prejudicial publicity. We have here a typical case of a community saturated by the news media. The factual situation here involves extensive, but localized, prejudicial pre-trial publicity. We have a factual situation which does not involve national nor regional news and a ruling that change of venue is requisite for such a situation would have brought justice to this Petitioner. The change of venue remedy needs to be made more readily available in southern states such as Alabama which historically seldom allow this to an accused.

In the records below the publicity of the local newspaper, radio and television media publications and the effect of the same were stressed. The record was complete with news addressed to the local Mobile community from Birmingham newspapers to show that a modest circulation of an out-of-town newspaper added to the cumulative effect of the publicity disseminated to the metropolitan Mobile area. The State has previously argued to this Court that these few clippings from the Birmingham newspapers reflected that the publicity extended heavily throughout Alabama and such is not the case nor will the records bear out such a view as there is simply no evidence within the records to substantiate such a finding. A change of venue in the cases below to an adjoining county would have relieved this accused from the saturation of publicity within the local county.

The jury selection, as pointed out by Justice Jones' dissent, would have not reflected the patent prejudice this accused was faced with from his peers if the change of venue had occurred.

We respectfully urge this court, in light of the matters cited above, that the injustice of these decisions requires a review of the record through jury selection in order for the full impact of the prejudice to be fully appreciated by the court. The law stands today with an enigma before it. The accused and his attorneys look to *Sheppard* for the rules and the offer of whatever protection is available by *Sheppard* to an accused. The accused is simply not receiving the protection of *Sheppard* because of the antagonism in our country presented by the First Amendment armour which surrounds the public media.

The Petitioner herein, although girded by *Sheppard*, was powerless to obtain the lower courts utilization of these rules in his behalf and based on the cases as we read them, other petitioners are powerless to have the protection of *Sheppard* because of the conflict between the court system as such and the freedom of the press arguments.

We do not argue that there should not be respect between the courts and the press; however, surely one is subservient to the other and surely freedom of the press should not be superior to the right of an accused to a trial free of prejudice.

In the cases as consolidated below, there is some dicta by the Court of Criminal Appeals that a continuance was granted. This Petitioner would show this was not sufficient. Continuances, however, of and in themselves are not the answer. The Petitioner wanted a speedy trial. Long drawn out continuances in a case such as we have here involving witnesses who are school teachers who frequently change employment merely allow for the scattering of evidence which is so vital to an accused. We query as to the second enigma under the rules as we know them today of how an accused can obtain a speedy trial which is his

right if all that he receives at the hands of the bench is a long continuance so that he might be served by this right to a trial free of prejudice because of prejudicial pre-trial publicity. The answer to this Petition is obvious. One can avoid a conflict between right to speedy trial and right to a forum free of prejudice, by this court mandating that a change of venue is required. We do not argue that a forum close by will be completely sterile of prejudice, but surely one would more apt obtain the rights under the Constitution as prescribed by our forefathers close by rather than in the very heart of the controversial matter which is to be debated.

CONCLUSION

For the foregoing reasons as well as those grounds set forth in the Petition for Writ of Certiorari, this Petitioner prays that this Court grant a rehearing of its order of denial of certiorari, vacate the order, grant the Petition and review the judgment and opinion of the Supreme Court of Alabama and the Alabama Court of Criminal Appeals setting aside the judgments affirming the Circuit Court of Mobile County and reversing the judgments of conviction.

Respectfully submitted

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Counsel for Petitioner

Certificate of Counsel

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay and that same is restricted to the grounds specified in Rule 58(2) of this Court.

Alvin M. Binder
511 East Pearl Street
Jackson, Mississippi 39201

Certificate of Service

I hereby certify that on this the 5th day of February, A.D., 1975, three true copies of the above and foregoing Petition for Rehearing were mailed United States Postage prepaid, to Honorable William J. Baxley, Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama 36104, Counsel for Respondent. I further certify that all parties required to be served have been served.

Alvin M. Binder
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